

## **NGUYEN (Migration) [2019] AATA 3749 (1 July 2019)**

- 1.
- 2.

### **DECISION RECORD**

|                           |                                                                                                       |
|---------------------------|-------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                          |
| <b>REVIEW APPLICANT:</b>  | Ms Thi Cham Nguyen                                                                                    |
| <b>VISA APPLICANTS:</b>   | Mr Van Dat Pham<br>Ms Thu Trang Pham                                                                  |
| <b>CASE NUMBER:</b>       | 1619476                                                                                               |
| <b>DIBP REFERENCE(S):</b> | OSF2016/039491                                                                                        |
| <b>MEMBER:</b>            | Hugh Sanderson                                                                                        |
| <b>DATE:</b>              | 1 July 2019                                                                                           |
| <b>PLACE OF DECISION:</b> | Sydney                                                                                                |
| <b>DECISION:</b>          | The Tribunal affirms the decision not to grant the applicants Partner (Provisional) (Class UF) visas. |

Statement made on 01 July 2019 at 9:14am

### **CATCHWORDS**

*MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – provided false or misleading information – failed to disclose former wife had relatives living in Australia related to review applicant by marriage – information about relationship with review applicant false or misleading – provision of false information undermines credibility of visa applicant and review applicant – undermined capacity of Department to properly assess relationship – no compelling or compassionate circumstances – decision under review affirmed*

### **LEGISLATION**

*Migration Act 1958 (Cth), ss 5F, 65  
Migration Regulations 1994 (Cth), Schedule 2, cls 309.211(2), 309.221, 309.225, Public Interest Criterion 4020*

### **CASES**

*Kaur v MIBP [2017] FCAFC 184  
Plaintiff M64/2015 v MIBP [2015] HCA 50  
Trivedi v MIBP [2014] FCAFC 42*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 3 November 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
4. The visa applicants applied for the visas on 18 February 2016. The delegate refused to grant the visas on the basis that the first named applicant (the visa applicant) did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the visa applicant did not meet the criteria in Public Interest Criterion 4020 (PIC 4020).

### Background

5. The visa applicant is a citizen of Vietnam and is currently 58 years old. He was previously married to Ngo Thi Thuy and there are two children of that relationship. The second named visa applicant is the youngest child of that relationship. She has applied for the visa on being a member of the family unit of a person who meets the primary criteria. The visa applicant divorced his wife on 11 June 2014.
6. The review applicant was born in Vietnam and is currently 55 years old. She has been previously married on two occasions. Her second husband sponsored her for a Partner visa and she became an Australian citizen on 17 May 2010. She divorced her second husband on 6 August 2010. She has two children from her first marriage who now reside in Australia.
7. The parties claimed that they were first introduced to each other when the visa applicant was sharing accommodation with the review applicant's elder sister, Thi Loan Nguyen in Hai Phong City in 2008. It was claimed the visa applicant was helpful to the review applicant's mother who suffered from multiple medical conditions. It was claimed they met in person for the first time in November 2009 when the visa applicant was visiting Vietnam. When the review applicant's mother died, the visa applicant assisted the family in arranging the funeral in January 2010. The review applicant travelled to Vietnam at that time, spending more than two months in Vietnam. Over that time it was claimed the parties met regularly.
8. It was claimed the visa applicant's relationship with his wife ended in 2010 when the visa applicant found his wife was having an affair. The review applicant returned to Vietnam in January 2012 and stayed with her sister where the visa applicant was also living. It was claimed the parties' relationship developed after that time and when the review applicant visited Vietnam in December 2013 he proposed marriage to her which she accepted.
9. In 2015, the review applicant's sister, Loan, and her husband migrated to Australia. The visa applicant remained living in Loan's house. The parties held a wedding celebration at Loan's home on 8 November 2015 and a reception was held at a restaurant. Their marriage was registered in Vietnam on 4 December 2015.
10. The visa applicant was interviewed by an officer from the Department on 26 September 2016. The transcript of the interview states as follows:

11. Q. Do you and the SP know each other prior to your first meeting in November 2009?  
12. A. No.
13. Q. Do you and the SP have any kind of relationship prior to November 2009?  
14. A. No.
15. Q. Who is your ex-wife?  
16. A. NGO Thi Thuy.
17. Q. When did your relationship with ex-wife end?  
18. A. 2014.
19. Q. When did you separate?  
20. A. 2010.
21. Q. Do your ex-wife and the SP know each other?  
22. A. No.
23. Q. Are you sure?  
24. A. Yes.
25. Q. I'm asking you again, do your ex-wife and the SP know each other or if they have any kind of relationship?  
26. A. No.
27. Q. Does your ex-wife have relatives in Australia?  
28. A. No.
29. Q. Are you sure?  
30. A. Only a very distant uncle.
31. Q. Are you sure, a distant uncle?  
32. A. Yes.
33. Q. Who is DO Thi Tong?  
34. A. My ex-wife's mother.
35. Q. Who is NGO Van Thai?  
36. A. This is the distant uncle.
37. Q. What is the relationship between DO Thi Tong and NGO Van Thai?  
38. A. (No answer given)
39. Q. Please answer?  
40. A. Mother and child.
41. Q. So what is the relationship between NGO Van Thai and your ex-wife?  
42. A. Sibling.
43. Q. Why did you say they were distant relative before?  
44. A. No, they are not distant relative.
45. Q. What is the relationship between NGO Van Thai and your sponsor?  
46. A. (No answer given).

47. The Department wrote to the visa applicant on 26 September 2016 noting that it appeared the visa applicant had provided false or misleading information in the

application and in response to the questions put to him in the interview. It was noted the Department records showed that:

- The visa applicant's former wife has many close relatives residing in Australia;
- The person who the visa applicant claimed was a "distant uncle" is her sibling; and
- The review applicant has had a close relationship with the visa applicant's former wife's relatives prior to their claimed first meeting in November 2009.

48. The Department advised the visa applicant that they may not meet PIC 4020 and was invited to comment on the information referred to and provide any compelling or compassionate reasons why the visa should be granted even if the visa applicant had provided false and misleading information. The visa applicant provided a statutory declaration where he made the following claims:

- The visa applicant had no contact with the review applicant prior to November 2009;
- When asked whether his ex-wife had relatives living overseas, he had heard his ex-wife talking about a distant uncle living in France, and therefore said this, even though he was not living in Australia;
- When asked about Ngo Van Thai he told the officer that it was his ex-wife's brother;
- The relationship between his ex-wife and his current wife is that his ex-wife's brother, Ngo Van Thai, married the review applicant's sister and is therefore the review applicant's brother-in-law but there is no relationship between his former wife and the review applicant;
- The visa applicant did not deliberately mislead the Department or provide incorrect information; and
- As the interpreter used had a different accent to the visa applicant, he had difficulty understanding him when interviewed.

49. The delegate who considered the application found that the visa applicant had provided false or misleading information in a material particular as he failed to disclose his former wife had many relatives living in Australia who were related to the review applicant by marriage. This was relevant to the inception and development of the claimed relationship and would also be relevant when considering whether the relationship was genuine. The delegate did not accept that there was any issue in respect of the visa applicant understanding the questions put to him when interviewed by the officer from the Department.

50. Based on these findings, the delegate found the visa applicant did not meet PIC 4020(1). As no information had been put for any reason to waive the criteria pursuant to PIC 4020(4), the delegate found the visa applicant did not meet PIC 4020 and therefore did not meet the criteria in cl.309.225 and refused the application.

### **Information to the Tribunal**

51. The review applicant provided further material to the Tribunal in support of the application. This included photos of the parties together, telephone records and evidence of the parties living together in Vietnam.
52. The matter was constituted to a Member of the Tribunal who conducted two hearings. The matter was reconstituted after that Member resigned from the Tribunal before finalising a decision on the matter.
53. The review applicant appeared before the Tribunal again on 26 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant's daughter and a friend. The visa applicant was to give evidence, however, could not be contacted by telephone and it was agreed that the decision should be made without the need to further interview the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The review applicant was represented in relation to the review by her registered migration agent who attended the Tribunal hearings.

### **Evidence of the review applicant**

54. The review applicant provided details of her relatives in Australia. She said that her sister, Diem, had previously been married to the visa applicant's ex-wife's brother, Ngo Van Thai. She said her sister and Ngo Van Thai were married in Vietnam in 1982. She recalled attending the wedding. She said that she recalled lots of family members being there, however, as it was so long ago she could not provide any details. She said that her sister and husband left Vietnam and eventually were granted a Humanitarian visa to come to Australia in 1991. It was claimed they were divorced in 2003.
55. The review applicant said that her sister and Ngo Van Thai had four children born in 1983, 1985, 1993 and 1996. She said that she sees the children quite often as the younger children are living with her sister in Australia. She said that Ngo Van Thai still lives in Australia, but she did not know the details of what he was doing. She believed he had remarried.
56. The review applicant said her husband's ex-wife's other brother, Ngo Van Son, was also living in Australia. She claimed that she had never met him, but just heard that he was living in Australia. She said that he had been living in Australia for about five years, but was not sure. He had one child, a son, who had been married to her daughter.
57. The review applicant was not certain when her daughter had married Ngo Van Son's son. They were married in Vietnam and she attended the wedding as did many other members of her family and the family of Ngo Van Son. She believed her husband attended the wedding, but they did not talk to each other and she was not sure if he was there. She said that she did not believe her husband's ex-wife attended the wedding. She said she thought it was strange that an aunt did not attend her nephew's wedding. She said that her daughter's relationship with Ngo Van Son's son ended in 2009 or 2010. She said that her daughter had sponsored Ngo Van Son's son for a Partner visa.
58. The Tribunal provided the information the Department had which indicated the visa applicant had provided false information when he was interviewed by an officer from the Department on 26 September 2016. The review applicant said the visa applicant

wanted to mention his ex-wife's eldest sibling who was living in France first and then would have mentioned the other siblings, but the interviewer stopped him from saying anything further. The Tribunal noted the transcript of the interview indicated the interviewer gave the visa applicant multiple opportunities to provide further information about any relatives of his ex-wife who lived in Australia and he failed to provide this information. The review applicant claimed that the accent of the interviewer meant the visa applicant did not understand the questions. The Tribunal noted in the transcript of the interview it indicates quite clearly that the interviewer repeated the questions to ensure the visa applicant understood them and had an opportunity to answer. The review applicant did not respond.

59. The Tribunal noted the Department referred to the failure of the visa applicant to refer to Ngo Van Thai and the fact that he had been previously married to the review applicant's sister. He also failed to mention that his ex-wife's brother, Ngo Van Son, was also living in Australia and that his son had been married to the review applicant's daughter. The review applicant claimed that they did not talk much about her daughter's marriage to Ngo Van Son's son. She acknowledged that the visa applicant would have known her daughter had married Ngo Van Son's son.
60. The Tribunal invited the review applicant to provide information as to why, if the Tribunal concluded information that was false and misleading had been provided by the visa applicant in a material particular to the application, there would be circumstances to justify the granting of the visa.
61. The review applicant said the fact that her sister had married the brother of her husband's ex-wife was not relevant to their relationship. She said they had been divorced in 2003. She said the visa applicant did not have dealings with professionals and did not know how to answer the questions.
62. The review applicant said that she was currently living with her daughter, her new husband and their three children. The eldest child suffers from autism. She said that she helps her daughter in her shop as well as helping her care for her three children, and in particular the eldest child.
63. The review applicant said that being separated from her husband has been very traumatic and difficult for her.

#### **Evidence of the other witnesses**

64. The review applicant's daughter said that she married her first husband, the son of Ngo Van Son, in 2008 in Hai Phong City, Vietnam. She said that her mother attended the wedding as did all her husband's family. This included the ex-wife of the visa applicant. She was not sure if the visa applicant attended the wedding.
65. The review applicant's daughter said that she sponsored the son of Ngo Van Son for a Partner visa. The review applicant's daughter proved a very poor historian and could not remember the dates of when various events took place, including the date of her marriage, the date of birth of her husband and the date of their separation. She said that her eldest child was born on 1 February 2011. As the father of this child is her current husband, she believed she would have separated from the son of Ngo Van Son in 2010.
66. The review applicant's daughter said she did not believe the visa applicant was trying to hide anything but because of his age he did not know how to answer the questions put to him during the interview.

67. The review applicant's daughter said that her mother had gone through two marriages and is far happier being with the visa applicant. She said that she needs her mother to help her in her shop and also to look after her children.
68. A friend of the visa applicant gave evidence. She testified as to the genuineness of the relationship between the visa applicant and the review applicant. She said that it was very difficult for the review applicant to be living separately from the visa applicant.
69. In coming to the decision, the Tribunal has taken into account all information provided by the review applicant and the visa applicant to the Tribunal. This includes having taken into account the information provided by the parties and other witnesses in the hearings that were conducted by the previous Member prior to the application being reconstituted.
70. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

71. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the applicant and each member of the applicant's family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
72. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

### **Has the applicant given, or caused to be given, a bogus document or information that is false or misleading in a material particular?**

73. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) (see the attachment to this decision). The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether

or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

74. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
75. In a statutory declaration of the review applicant dated 12 September 2016, provided by the visa applicant to the Department, it was claimed that the review applicant was first told about the visa applicant in 2008 when he started living at the review applicant's sister's home in Vietnam (paragraph 13).
76. In that statutory declaration, it was claimed that the review applicant and visa applicant first met each other on 13 November 2009 (paragraph 19). It was claimed the review applicant had only first been told about the visa applicant in 2008 and they only first met in November 2009 (paragraph 35).
77. When interviewed, the visa applicant repeated the claim that the parties first met each other in November 2009, that his ex-wife and the review applicant did not know each other or have any other kind of relationship and that his ex-wife did not have any relatives in Australia.
78. The facts are as follows:
  - The visa applicant's ex-wife's brother, Ngo Van Thai, was married to the review applicant's sister in 1998 and divorced her in 2003;
  - The visa applicant's ex-wife's brother, Ngo Van Thai, resides in Australia as do his four children;
  - The visa applicant's ex-wife's brother, Ngo Van Son, resides in Australia as does his son, who was married to the review applicant's daughter in about 2008 and separated from him in about 2010; and
  - The review applicant's daughter sponsored Ngo Van Son's son for a Partner visa which was granted to him.
79. The Tribunal does not accept the information given by the visa applicant when interviewed and provided by the visa applicant from the review applicant provided correct information as to their first meeting or knowledge of each other. The Tribunal finds the information provided by the visa applicant as to the relatives of his ex-wife who reside in Australia and her relationship and knowledge of the review applicant was false and misleading. The Tribunal finds that the information provided by the visa applicant as to his relationship with the review applicant was false or misleading.
80. The Tribunal finds the review applicant and the visa applicant would have been aware of each other before 2008 when it was claimed the review applicant's sister first told the review applicant of the visa applicant. It was claimed the review applicant's daughter was married to the nephew of the visa applicant's ex-wife in 2008 and that the family members of the ex-wife attended the wedding. The review applicant said she believed this included the visa applicant but not his ex-wife. If the



claimed relationship between the review applicant's daughter and the visa applicant's ex-wife's nephew was genuine the Tribunal does not accept the review applicant would not have been aware of and had not met the visa applicant and his ex-wife at that time. This is particularly so as the review applicant's daughter was marrying the nephew of her aunt's (Diem) former husband.

81. The family relationship between the review applicant and the visa applicant's ex-wife's siblings extends to 1998. It was continuing after that, even though it is claimed that the review applicant's sister divorced her husband, Ngo Van Thai, in 2003. The review applicant continued to have regular contact with her sister's children after she arrived in Australia and would have been aware of the ex-wife as she was also an aunt of those children.
82. The fact that the review applicant's daughter also developed a relationship with the nephew of the ex-wife indicates there was a continuing relationship between the families. It is not plausible that the visa applicant would not have been aware of the review applicant and her relationship with his former wife well before 2008 and would have met her on occasions when she was either living in Vietnam or visiting Vietnam when she was residing in Australia.
83. The visa applicant claims to have been living with the review applicant's sister, Loan, in 2008. It was claimed the review applicant and visa applicant first met in person in November 2009. It was claimed the visa applicant only separated from his wife in 2010. It is not plausible that the visa applicant would not have been aware of the fact that his then wife was related by marriage to the review applicant, both as her brother had previously been married to the review applicant's sister and as his ex-wife's nephew was married to the review applicant's daughter. That the visa applicant and his ex-wife were living with the review applicant's sister (Loan) in Vietnam means that it would be impossible for the visa applicant not to have been aware of his ex-wife's relationship to the review applicant and her sister and also aware of the family members of his ex-wife who were living in Australia.
84. The Tribunal finds the visa applicant knew of his ex-wife's relationship to the review applicant. The Tribunal finds the visa applicant knew of the relatives of his ex-wife who reside in Australia.
85. When interviewed by the Department (as set out above), the visa applicant repeated the claim that he first met the review applicant in November 2009 and that his ex-wife did not know the review applicant and stated his ex-wife did not have any relatives in Australia. It was only when specifically challenged with the information the Department had that the applicant provided limited details in response.
86. In a statement, dated 7 October 2016, provided to the Department the visa applicant repeated his claim that he only first met the review applicant in November 2009. He claimed that he only mentioned a distant uncle in France of his ex-wife, because he had heard his ex-wife talking about him. He claimed that he did tell the delegate about Ngo Van Thai and therefore "did not deliberately mislead the Department or want not to tell them the truth".
87. The Tribunal accepts the record of the interview provided by the Department accurately sets out the questions put by the Departmental officer and the responses recorded to the questions put to the visa applicant. The visa applicant and review applicant raised certain issues with regard to this interview, however, the Tribunal is satisfied that the record of that interview is accurate.

88. The visa applicant was specifically asked questions about his ex-wife's relatives in Australia. It is not plausible that if asked a specific question about relatives in Australia he would only refer to a relative he said he had heard his ex-wife speaking about who lived in France. This is particularly so if the review applicant's daughter was married to the son of his ex-wife's brother who resided in Australia. It is also not plausible that he would not have made immediate reference to his ex-wife's other brother who was living in Australia and previously married to the review applicant's sister.
89. It was claimed the visa applicant was not given the opportunity by the interviewer to answer the question fully. The Tribunal does not accept this. The record of the interview indicates the visa applicant was specifically asked if his ex-wife has any relatives in Australia and he responded by saying "no". When asked if he were sure about this, he responded by saying there was "only a very distant uncle". He now claims he was referring to a brother living in France. It was only when the delegate specifically put information as to Ngo Van Thai that the visa applicant acknowledged this person as being a relative of the ex-wife who resided in Australia.
90. The answers provided by the visa applicant show that he was deliberately failing to provide information about the relationship between his ex-wife and the family of the review applicant. Even after the fact that the Department had specifically referred to Ngo Van Thai and the visa applicant acknowledging this information is correct, the visa applicant failed to mention at the interview or in his statement provided after the interview that his ex-wife's brother, Ngo Van Son, resided in Australia and that Ngo Van Son's son had been married to the review applicant's daughter. The failure for him to provide this information after the interview in his statement further indicates the visa applicant was deliberately providing false and misleading information in respect of his and his ex-wife's relationship with the review applicant.
91. It was claimed that as the person interviewing the visa applicant was from central Vietnam and the visa applicant was from northern Vietnam that the responses from the visa applicant were not accurately reported or the meaning was misunderstood. Specifically, an issue was raised as to the visa applicant referring to "a distant uncle" and not a brother of his ex-wife. It was claimed that the use of the word "uncle" and "brother" is interchangeable with the use of the word "uncle" being a term of respect typically given to elder siblings.
92. The Tribunal accepts that there are some differences in terminology used and accents in different regions in Vietnam. The Tribunal does not accept, however, that this led to any misreporting or indicates that the visa applicant was not providing false and misleading information when interviewed.
93. In the statement provided by the visa applicant after the interview he again refers to a "distant uncle in France". He only then refers to his ex-wife's brother, Ngo Van Thai (failing to mention Ngo Van Son), residing in Australia. Whether the visa applicant was referring to an actual uncle of his ex-wife or a brother, it does not change the fact that when specifically asked about relatives of his ex-wife residing in Australia he initially responded by saying she had none and then only acknowledged Ngo Van Thai after the Department put this specific information to him and failed to refer to his ex-wife's other brother, Ngo Van Son, who resided in Australia and whose son had previously married the review applicant's daughter.
94. The Tribunal is not satisfied that any difficulties with the difference in accents and terminology between a person from northern Vietnam and central Vietnam has

caused any misunderstanding or error in the information provided as to the answers given by the visa applicant when interviewed.

95. The visa applicant failed to advise the Department that his ex-wife's brother, Ngo Van Son, was residing in Australia or that his son had previously been married to the review applicant's daughter. The review applicant claimed that the reason for this was because they did not talk much about her daughter's marriage to Ngo Van Son's son. The Tribunal does not accept this.
96. As the parties claimed they first met each other in November 2009 this would have been during the time that the review applicant's daughter was married to Ngo Van Son's son and was sponsoring him for a Partner visa. Regardless of whether that relationship was ever genuine or that it ended in divorce after a short period, the Tribunal does not accept that any embarrassment as to the nature of that relationship would have caused the visa applicant to fail to refer to the fact that his ex-wife's brother was residing in Australia and his son had previously been married to the review applicant's daughter or that the visa applicant would not have considered this a relevant issue about which he would be required to advise the Department. That he did not even refer to this information in his statement provided after the interview further indicates that the visa applicant was deliberately providing false and misleading information in relation to his Partner visa application. The Tribunal does not accept that any personal embarrassment about any claimed relationship or family history provides any excuse for a person to fail to provide the information to the Department.
97. The review applicant claimed that the visa applicant was not an educated person and had difficulties in responding to the questions of the Departmental officer. The Tribunal does not accept that this is an explanation as to why the false and misleading information was provided by the visa applicant when interviewed. As indicated above, the Tribunal has accepted the record of the interview is an accurate record of the questions put to the visa applicant and his responses. The questions put during the interview were simple. It is clear the Departmental officer was aware of information which showed the visa applicant was not being truthful in his responses. When the visa applicant responds with an answer the Departmental officer is aware is incorrect the Departmental officer asks the visa applicant if he is sure about his answer and asks him to clarify the answer. The Tribunal does not accept that any person with only limited education would not have been able to provide the correct information based on the questions put to him.
98. The Tribunal finds that the visa applicant provided information that was false and misleading in support of his application by way of the statement provided by the review applicant and to an officer of the Department when being interviewed.
99. The information that was false and misleading was a material particular in relation to the Partner visa application. In assessing whether the parties are in a genuine and continuing relationship one of the significant factors to consider is the credibility of the parties. The fact that information was being provided to the Department that was false and misleading as to the nature and history of the relationship between the visa applicant and the review applicant undermines the credibility of both the visa applicant and the review applicant and the capacity of the Department to properly assess the application.
100. The failure to provide information as to the relationship between the review applicant's family and the visa applicant's ex-wife's family undermined the capacity of the Department to properly assess the inception and development of the claimed

relationship. It hindered the Department's capacity to carry out further investigation as to the genuineness of the relationship. It prevented the Department from comparing the claims and information that had been provided in the Partner visa application of Ngo Van Son's son sponsored by the review applicant's daughter to the claims now being made in the current application.

101. For the above reasons, the Tribunal finds that the visa applicant has given, or caused to be given, to the Department information that is false or misleading in a material particular in relation to the application for the visa. Therefore, the applicant does not meet PIC 4020(1).

**Should the requirements of PIC 4020(1) or (2) be waived?**

102. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
103. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
104. In response to the Department's initial assessment that the visa applicant did not meet PIC 4020(1) the visa applicant did not provide any information of any compassionate or compelling circumstance that would justify the granting of the visa.
105. The review applicant has subsequently provided extensive information claiming that she is in a genuine and continuing relationship with the visa applicant. At the hearing, the Tribunal specifically raised the issue of the waiver and invited the review applicant to provide further information.
106. There is no information that there are compelling circumstances that affect the interests of Australia which would justify the granting of the visa.
107. The claim is made that the circumstances of the review applicant, who is an Australian citizen, does provide a compassionate or compelling circumstance to justify the granting of the visa. It is claimed the review applicant is in a genuine and continuing relationship with the visa applicant. She is under great emotional stress due to her separation from the visa applicant and the situation she has with her family. She lives with her daughter and her daughter's husband and their three children. Their eldest child suffers from autism. The review applicant provides assistance to her daughter in managing her shop in Shellharbour. She also provides assistance for her care of her daughter's autistic child.
108. Little information has been provided as to the details of these claims. No report has been provided as to the circumstances of the review applicant's daughter's eldest child or their care requirements.

109. The Tribunal has not made any critical assessment of the relationship between the visa applicant and the review applicant. For the purposes of this decision, the Tribunal has accepted at face value the claim that the parties were at the time of the application and continue to be in a genuine and continuing relationship.
110. The criteria in cl.309.211(2) and cl.309.221 require that the visa applicant is the spouse of the review applicant as defined in s.5F of the Act. This requires, in part, that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The requirement in cl.309.225 that the visa applicant meet the criteria in PIC 4020 is in addition to the requirement to be in a genuine and continuing relationship. If the relationship itself can be considered a compassionate or compelling reason affecting the interests of an Australian citizen to justify the granting of the visa then it must be more than just the fact the parties are in a genuine and continuing relationship. In considering whether the relationship is a compassionate or compelling circumstance to justify the granting of the visa, the Tribunal has taken into account all aspects of the claimed relationship, including the length of the relationship, its nature, the bonds between the parties, the consequence of any separation even if only for a limited time, and the effects on other parties including the extended family members of the review applicant.
111. The parties were married at the end of 2015, a period of three and a half years. The application for the visa was filed in February 2016. Over that period, the review applicant has been able to travel to Vietnam to spend time with the visa applicant. They have been able to maintain their relationship through correspondence and using other technology to communicate with each other. They have maintained their relationship.
112. If the visa is refused the visa applicant would not meet the criteria in PIC 4020(2) in respect of any new application for a Partner visa for a period of three years before the application was made. He would only meet this criterion (if it were not waived) by filing an application after 3 November 2019, in five months' time. There would be a further delay for that application to be processed and, if successful, a Partner visa granted to the visa applicant.
113. The Tribunal accepts the review applicant has a number of moral obligations which would prevent her from being with the visa applicant for an extended period in Vietnam. This includes her care of her daughter's children, and in particular her daughter's autistic child, and also the assistance she provides in her daughter's business. Although it is claimed the visa applicant would also be able to provide assistance to the review applicant's daughter, there is little or no information which would support this claim.
114. Overall, the Tribunal is not satisfied that the circumstances that affect the interests of the review applicant or any members of her extended family resident in Australia provide a compassionate or compelling circumstance that would justify the granting of the visa. The review applicant and her family have the support of each other in Australia. They also have the support of both of the review applicant's sisters and their extended families. The review applicant has been able to travel to Vietnam to spend some time with the visa applicant and there is no information which would indicate she would be prevented from doing so in the future. The Tribunal is not satisfied that the review applicant suffers from any separation anxiety or any other condition upon which she is dependent upon the visa applicant. There is no information which would indicate the visa applicant would be providing any specific care for the review applicant or any member of her family. There is no information

which would indicate that the needs of the review applicant and any member of her family in Australia are not being met or are not currently being adequately cared for.

115. Therefore the requirements of PIC 4020(1) should not be waived. On the basis of the above, the visa applicant does not satisfy PIC 4020 for the purposes of cl.309.225.
116. As the application of the second named visa applicant is based on being a member of the family unit of a person who meets the primary criteria, and as her father does not meet the primary criteria, the second named visa applicant does not meet the criteria for the grant of the visa. Accordingly, the decision to refuse the visa applications must be affirmed.

## **DECISION**

117. The Tribunal affirms the decision not to grant the applicants Partner (Provisional) (Class UF) visas.

Hugh Sanderson  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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